Bias as Affecting Credibility

William G. Hale
BIAS AS AFFECTING CREDIBILITY

BY WILLIAM G. HALE

PROFESSOR OF LAW, HASTINGS COLLEGE OF THE LAW
DEAN EMERITUS, SCHOOL OF LAW, UNIVERSITY OF SOUTHERN CALIFORNIA

1. IN GENERAL

It is accepted doctrine that the bias of a witness will affect his credibility. The existence of bias does not necessarily imply conscious falsehood. It is quite likely however to shade at least, though unwittingly, a witness' testimony, the bias may be in favor of one side or against the other. Granted its existence it may be appropriately taken into consideration in weighing the testimony.

Since bias is a state of mind, its existence can be determined only circumstantially. These circumstances may consist of relationships (e.g. that witness is the father of the plaintiff) or dealings or encounters calculated to develop a prejudice (e.g. a fight with the party against whom the testimony is given) or conduct, or utterances. These designations are only by way of illustration. As Mr. Wigmore (Sec. 949) has well said, "The range of external circumstances from which probable bias may be inferred is infinite." Experience tells us for all practical purposes what those circumstances are in individual situations. Evidence of bias is considered of such value that the existence of facts, implicit of it, may be ascertained either by cross-examination or by extrinsic testimony. Considerations of auxiliary policy, such as surprise or collateral issue, have not been deemed relatively sufficient to limit the method of proof.

Such differences as are found in the various jurisdictions do not go to the fundamental principle underlying this evidence, but only to a minor element of procedure. The point at issue is whether a foundation must be laid for resort to extrinsic testimony, by first making appropriate inquiry of the witness as to the facts indicative of bias.

The variations of rule in the United States are as follows: (1) No foundation is required; (2) A foundation is required where the alleged evidence of bias consists o
a statement made by the witness, following the analogy of impeachment by a prior contradictory statement; (3) In some jurisdictions the rule requiring a foundation is extended, at least ostensibly, to cover cases where evidence of bias takes the form of conduct. For example, one finds in a few California cases language like the following:

"Appellant sought to impeach a witness against him by proof of declarations and conduct tending to show an unfriendly feeling on the part of the witness toward appellant. The witness was not asked concerning these acts or declarations. There was therefore no foundation laid for the introduction of the impeaching testimony of third persons and the rule excluding it was correct. It is necessary to lay the foundation for such evidence by calling the attention of the main witness to the alleged acts and declarations and giving him an opportunity to explain them, as in the case of inconsistent statements."

(Estate of Bedford, 158 Cal. 145, 147. It does not appear what the "acts" were that were presumed to indicate bias.)

In discussing the question whether the rule applied to impeachment by prior contradictory statements should on principle be extended to the field of bias, Mr. Wigmore (Sec. 953) remarks:

"Under ordinary circumstances it should be (i.e. where the evidence of the bias takes the form of statements). But the rule requiring such an inquiry before proving a prior self-contradiction has been pushed so far, and applied so stiffly and arbitrarily, that on the whole it now does quite as much harm as good. To import it in its present shape into any subject where it does not strictly belong by precedent, seems unwise. Were the rule properly administered, no doubt it should have a place here also. But the rule, in any case, applies only to utterances, not to conduct or circumstances such as an assault or employment."

I agree with Mr. Wigmore that there is merit in the principle which led the courts, at common law, to declare that a witness should first have his attention called to a prior self-contradiction before offering extrinsic testimony thereto. The principle is based not only on considerations of fairness to the witness in making ample provision for explanation by him, and on the very practical consideration of possible economy
of time which would be secured if the witness admitted outright the prior statement, but also it is a principle which would largely eliminate the evil of unfair surprise as to a collateral issue of fact, since it would serve as a warning that such issue might be pressed later through extrinsic testimony.

In meeting Mr. Wigmore's objection to the extension of that principle based upon a too arbitrary handling of it by the courts, it may be sufficient to suggest, as we approach the task of revamping the California Code, that we safeguard the general principle against prostitution and thereby justify its extension to both circumstances and statements in the field of bias.

Statements found in court opinions, such as in the quotation from the Supreme Court of California (supra) that a foundation must be laid in the case of conduct, as well as utterances, indicative of bias, call for special consideration. First it may be asked whether any of the courts actually have gone beyond a case involving utterances, and second, granting that they have not, whether the law ought not to be extended even into the field of conduct and perhaps beyond that. There is some uncertainty as to the actual state of the law. It arises from possible ambiguity in the use of the word "act" or "conduct". For example, at times the evidence of bias is that the witness attempted to bribe or otherwise improperly influence another witness in the case. This may be termed an "act". The evidence offered, however, takes the form of utterances. The actual inquiry, therefore, is concerning what was said on a certain occasion. One may contrast with this, evidence of a fight between the witness and the party to the action against whom he has testified. And then in still another category may be placed evidence of a relationship indicative of bias, e.g. that witness is the brother of the party for whom he is testifying, or an employee of such party.

In considering the problems here suggested the Queen's Case, (1820) 2 Brod. P.B. 284, 129 Eng. Reprint, 976, 897, offers a good starting point. The following question was proposed to the Judges:

"Whether, according to the practice and usage of the courts below, and according to law, when a witness in support of a prosecution has been examined in chief, and has not been asked on cross-examination as to any declarations made by
him, or acts done by him, to procure persons corruptly to give evidence in support of the prosecution; it would be competent to the party accused, to examine witnesses in his defense, to prove such declarations or acts, without first calling back such witness examined in chief to be examined or cross-examined as to the fact, whether he ever made such declarations or did such acts?"

This question was answered in the negative. The English court sees no distinction in principle between this set-up and that where the impeachment takes the form of a prior self-contradictory statement. It gives as the reasons which support the requirement of inquiry first on cross-examination, the following: (1) The witness "has an opportunity of giving such reason, explanation, or exculpation of his conduct, if any there be, as the particular circumstances of the transaction may happen to furnish, and thus the whole matter is brought before the court at once, which, in our opinion, is the most convenient course"; (2) If the opportunity of explanation is not thus afforded in the first instance, it may be wholly lost "for a witness, who has been examined, and has no reason to suppose that his further attendance is requisite, often departs the Court, and may not be found or brought back until the trial be at an end. So that, if evidence of this sort could be adduced on the sudden and by surprise, without any previous intimation to the witness or to the party producing him, great injustice might be done to the party . . . and one of the great objects of the course of proceeding established in our Courts is the prevention of surprise, as far as practicable, upon any person who may appear therein."

In discussing the point that the inquiry here had reference to an "act", the court said:

"Now such acts of corruption are ordinarily accomplished by words and speeches; an offer of money or other benefit derives its entire character from the purpose for which it was made, and this purpose is notified and explained by words; so that an inquiry into the act of corruption will usually be, both in form and effect, an inquiry as to the words spoken by the supposed corrupter; and the words spoken for such a purpose do, in our opinion, fall within the same rule and principle, with regard to the course of proceeding in our courts, as words spoken for any other purpose; and we do not, therefore, perceive any solid distinction with regard to this point
between the declarations and the acts mentioned in the question proposed to us. It will be obvious, that the observations regarding convenience and inconvenience, which we have taken the liberty to offer to your Lordships as to the proof of words, are alike applicable to the proof of acts."

Nice and subtle distinctions.

If the rule demanding a foundational inquiry in a case of bias based solely on words is sound, it is believed that the view of the English judges is sound in including cases of bias evidenced by conduct plus words. The practical difficulty of drawing a line between these two types of cases furnishes an adequate reason for so formulating the rule that it would be unnecessary to make the distinction. But it is submitted that there is further and more fundamental reason for the extension of the rule. One reason often urged for requiring a foundation in the case of alleged contradictory statements is that utterances are seldom transmitted by the bearer with absolute exactness but rather in the form of impressions and hence the utterer should have an opportunity to explain his statements and thus put them perhaps in their true light. Inflection even can change a meaning. Tradition has it that in old frontier much depended upon the presence or absence of a smile on the part of the colorful conversationalist when he engaged in certain forceful repartee. It would seem to follow that wherever utterances come into the picture, even if acts also figure in it, the importance of explanation may be quite as great. But this step may logically lead to another. If the evidence of bias consists only of acts, ambiguity may be involved. The fact of bias is an implication from the acts. An exchange of blows may be a fight or a friendly bout. Thus the way is paved for including within the rule all cases of conduct indicative of bias, whether accompanied by evidence of words or not.

Finally it remains to ask whether bias implied from relationship falls in the same category. I believe it does not. Whether the witness is a brother or employee of the party for whom he testifies, calls for no explanation. The only issue here involved is whether the relationship actually exists. The principle, therefore, which has been relied on in the foregoing situations has no application here. Nevertheless, may it not
also be desirable to require a preliminary inquiry of
the witness concerning such matters before undertaking
to call other witnesses thereto? The law of evidence
in more than one instance emphasizes the evil of sur-
prise. Neither the witness who is sought thus to be
impeached nor the party who calls him can anticipate
such an issue. If no inquiry is made of the witness,
during his cross-examination, he may well be dismissed
and may be out of reach when the attack is after made
on him. Neither he nor anyone else therefore could be
readily called in rebuttal. To demand a preliminary
inquiry of the witness, during his cross-examination,
imposes no special hardship on the cross-examiner. If
the witness admits the relationship, as he may if it is
time is saved. If he denies it, the inquiry
will have served as a warning to prepare by the call-
ing of other witnesses to sustain him in case the cross-
examiner later follows up this attempted impeachment.
The requirement should not be absolute, but should be
applied subject to a reasonable discretion.

It is recognized, of course, that we here would
be departing from traditional procedures, but we offer
the suggestion as worthy of consideration. It is also
recognized that the principle underlying such extension
carries beyond the field of bias. It would include all
modes of impeachment in which the facts, impeaching in
their character, would be within the knowledge of the
witness and which are now open to proof by extrinsic
testimony - for example that witness was intoxicated
at the time of the event, or that witness had been con-
victed of a crime.

The Supreme Court of Alabama in Allen v Fincher,
(1914) 187 Ala. 599, 65 So. 946, while deciding on the
basis of settled authority in that state that evidence
of bias could be offered without any prior foundation
inquiry, nevertheless gives strong moral support to the
views here expressed, in the following language:
"As the multiplication of issues is not desirable, it,
would seem that the better rule would require the party
against whom a witness is testifying to develop, on cross-
examination, the fact of the bias of the witness. If, on
the cross-examination, the witness admits the facts show-
ing his bias, then there should, at once, be an end of the
matter. If he, on such cross-examination, denies the
facts showing such bias, then the party against whom he
has testified should be - and in all courts, including our
own, is - allowed to show by other witnesses the existence of such facts. While for administrative purposes, the better rule on the subject is, in our opinion, the one which we have above indicated, and while the question is one only of practice, our predecessors, in the cases above cited, have declared the rule in this state to be as we have quoted it (viz: that no preliminary inquiry on cross-examination is required.)"

2 CASES DEALING WITH BIAS, WHICH HAVE A BEARING ON THE REQUIREMENTS AS TO FOUNDATION.

People v Ye Foo, (1907) 4 Cal. App. 730, 737, 89 Pac. 450. The State was allowed to impeach one of defendant's witnesses by extrinsic testimony that this witness had offered a bribe to one Edgar to give certain testimony favorable to the defendant. It was objected that a sufficient foundation had not been laid in that the attention of the witness had not been called to "the parties present at the time of the alleged bribery conversation." In affirming the trial court, the Appellate Court declares:

"The better course would have been to have called the attention of the witness Jue Doe Men to the persons present at the alleged conversation, but the omission to do this is not necessarily fatal to receiving impeaching testimony. The attention of the witness was called to the circumstances of time and place, and it clearly appeared that he understood the occasion referred to and the conversation to which his attention was directed. He gave his version of the conversation and denied that he offered Edgar twenty dollars.

NOTE: It will be observed that the inquiry related to a conversation. It is assumed that a foundation was necessary. The opinion shows some liberality in the application of the rule.

People v Delbos, (1905) 146 Cal. 734, 738. The only statement in the case bearing on the question of impeachment is as follows:

"There were other exceptions to the refusal of some evidence tending to lay the foundation for proof that the prosecution was instituted by the prosecuting witness for the purpose of extorting money from the defendant. It was proper to show this fact to impeach the motives of the prosecuting witness, but the questions asked should have been preceded by a direct question. The prosecuting witness should have been first asked if she had not begun the prosecution for that
NOTE: Without the entire record in this case before one, it is difficult to get the import of this language. It seems fair to assume that evidence of such motive would consist chiefly of statements. If so the case falls in the "utterance" category.

_Estate of Bedfore_, (1910) 158 Cal. 115, 110 Pac. 302. This case, also, is short on fact background. Nothing appears except what is incorporated in the quotation from the opinion which appears (supra) in the text of this memorandum. It is there indicated that "declarations and conduct" were offered as "tending to show an unfriendly feeling." It does not appear whether the "declarations" and the "conduct" were in any way inter-related. The case, therefore, can not be cited definitely to the proposition that were the hostile episode consists exclusively of an "act" the rule calling for a foundation inquiry would be applied. Hence, quaere as to a case involving "act" only.

_Baker v Joseph_, (1860) 16 Cal. 173, 177. This case holds that proof of declarations of hostility by a witness is governed by the rule applicable to impeachment by proof of prior contradictory statements. The _Queen's Case_, quoted from (supra) in the text of this memorandum, is cited and relied upon. The following discussion of the problem presented is instructive:

"It is said that the Court erred in excluding proof of the state of feeling of the witnesses Oppenheim and Brooks. On cross-examination, Oppenheim testified that he had no animosity towards Joseph. He also testified that, 'since the commencement of this suit, and at no other time, I never stated to Mrs. Fox that I would ruin defendant, or words to that effect! The appellant offered to prove by Fox that, in conversation with appellant, held about the time of the commencement of this action, Oppenheim told him he would ruin the defendant. Some other testimony of like import was offered and rejected. The ground of this rejection was the obvious one that the questions were not directly put to the witness, whether he had made these statements, and proper information as to time and place, and the precise matter which was to be used against him given, so that an opportunity might be afforded to rebut or explain it. It is unquestionable that where a witness is sought to be impeached by proof of contradictory statements, made or alleged to have been made by him, it must be brought to the knowledge of the witness what the
precise matter of these contradictions is, and the time and place of making them. This rule is based upon a principle of justice, which requires that the witness have a fair opportunity of explaining what, without such explanation, might appear to be suspicious. But it is said that the same rule does not hold in regard to expressions of hostility or ill (178) feeling on the part of the witness. It is argued that the value and weight of testimony, in some degree, depend upon the state of feeling of a witness; that a witness, whose feelings are embittered against a party, is not so worthy of credence as a witness standing indifferent; and that, therefore, proof of this state of unfriendly feeling is admissible, as independent evidence affecting the testimony of the witness. This distinction is more plausible than sound. No mode of ascertaining the state of feeling of the witness exists, except that disclosed by the declarations or the acts of the witness sought to be impeached by these declarations. The same principle, which assures to him the privilege of explanation when contradictory declarations are offered, applies to assure him the right of explanation, when declarations of hostility are sought to be introduced. In effect, it is attempted to be shown that the witness has asserted, directly or impliedly, something different from the present testimony; that, whereas he professes or holds himself out to be an indifferent and impartial witness; testifying without prejudice or feeling, yet, really and in fact, he is a prejudiced witness, whose passions color his testimony. The weight of authority and the reason of the rule, are as we have stated them. We can see no distinction between admitting declarations of hostility of the witness, by way of impairing the force of his testimony, and admitting contradictory statements for the same purpose, so far as this rule is concerned; for, in either case, an opportunity should be given the witness to explain what he said. We understand this doctrine to be laid down by the best standards. Thus, PH. Ev 2 vol. 435, says: 'The rule that a witness ought to be cross-examined as to contradictory statements, before they can be admitted in evidence to impeach the credit of his testimony, has been extended not only to contradictory statements, but also to other declarations of the witness, and to acts done by him through the medium of declarations or words; so that, if it is intended to offer evidence of former declarations of a witness, or of acts done by him touching the cause, not with a view to contradict his statement upon oath, but for the purpose of discrediting him as a corrupt witness, or as one who
would corrupt other witnesses, in this case also, it has been determined that the witness should be previously questioned as to them in cross-examination. This appears from an answer of the Judges to a question put to them by the House of Lords, (in the Queen's Case) in the course of the proceedings before referred to. The question was in the following words: "If a witness in support of (179) a prosecution has been examined in chief, and has not been asked in cross-examinations as to declarations made by him, or as to acts done by him, to procure persons corruptly to give evidence in support of the prosecution, whether it would be competent to the party accused to examine witness in his defense, for the purpose of proving such declarations or acts, without first calling back the witness to be examined or cross-examined as to the fact whether he ever made such declarations or did such acts?" Another question was the following: 'If a witness, called on the part of a plaintiff or prosecutor, gives evidence against the defendant, and if, after the cross-examination of the witness by the defendant's counsel, they discover that the witness so examined has corrupted or endeavored to corrupt another person to give false testimony in such case; whether the defendant's counsel may not be permitted to give evidence of such corrupt act of the witness, without calling him back?' The Judges were of opinion, on both questions, that the proposed proof could not be adduced without a previous cross-examination of the witness as to the subject matter, 'The general rule,' says the Lord Chief Justice, 'and the general practice is this: If it be intended to bring the credit of a witness into question, by proof of anything that he may have said or declared touching the cause, the witness is first asked, upon cross-examination, whether or not he has said or declared that that which is intended to be proved.' (Carpenter v Wall, 11 A. & E. 803; 2 Barb. 211; 121d. 596; 1 Greenl. Ev. Sec. 462.) This author says that the rule is extended, not only to contradictory statements by the witness, but to other declarations, and to acts done by him through the medium of verbal communications or correspondence, which are offered with the view to contradict his testimony in chief, or to prove him a corrupt witness himself, or to have been guilty of attempting to corrupt others.'

"The offer to introduce the proof of the declarations of the witnesses, Oppenheim and Brooks, did not meet the requirements of the rule, as laid down in the Queen's Case, and now generally recognized. There was no such
 specification of time, place and occasion as to give to
the witness the full opportunity of explanation."

People v Pickens, (1923) 61 Cal. App. 405, 408.
Extrinsic evidence may be offered to show that a wit-
ness and a party, for whom he testifies, are members of
the same lodge, without first inquiring on cross-exam-
ination as to such fact.

NOTE: This is dictum in the case. (See following cases
in which the bias was evidenced by statements: Silvey v Hodgdon,
(1874) 48 Cal. 185; People v Gardner, (1897) 98 Cal. 127, 132;
Fagan v Lentz, (1909) 156 Cal. 681; Ash v Soo Sing Lung, (1918)
27, 34, 265 Pac. 366.

People v Brooks, (1892) 131 N.Y. 321. The trial
court ruled out the following evidence, calculated to
show the bias of a witness for the state against the
defendant, on the ground that the state's witness had
not been cross-examined as to the matter. Defendant
was on the stand and was questioned by her counsel as
follows: "Now state whether or not Charlotte (the
witness for the state) was friendly to you or unfriend-
ly?" "Did you and Charlotte have frequent difficulties
during that time?" Did Charlotte assault you upon
other occasions previous to the fire?"

HELD: The trial court erred in ruling out this exam-
ination. No foundation is required in such a case.
It does not fall within the principle applicable to
impeachment by prior contradictory statements.

NOTE: This case is cited with approval in People v
Pickands (supra).

Brink v Stratton, (1903, N.Y.) 68 N.E. 148.
Action on a promissory note. The defendants allege
payment by one C. C was called as a witness for the
defendant. Three witnesses testified as to the repu-
tation of C for truth and veracity. C was then called
as a witness and asked the following questions concern-
ing the witnesses who had testified as to his bad repu-
tation, all of which were objected to and in each case
the objection was sustained.

1. Was Mr. Boyd opposing you and you opposing
Mr. Boyd for a number of years in your papers?
2. Each one attacking the other through his
3. What have been the relations between you and Mr. Wilbur?
4. Was Arthur Wilbur one time superintendent of schools?
5. Did your paper attack him?
6. I will ask you whether or not by reason of the position of the Forum against Mr. Wilbur, whether or not he was defeated as superintendent of the schools?

HELD: That it was prejudicial error to exclude the above questions. The court reasoned as follows:

"That it was competent to prove the hostility of any or all of these witnesses towards the defendants, or either of them, by their cross-examination or by other testimony; that it was not necessary that the witness should be first examined as to his hostility before calling other witnesses is not limited to contradicting him in case he denies hostility - is well established by the decisions of this state.

"The extent, however, to which an examination may go for the purpose of proving the hostility of a witness must be, to some extent at least, within the discretion of the trial judge. It should be direct and positive, and not very remote and uncertain, for the reason that the trial of the main issue in the case cannot be properly suspended to make out a case of hostile feeling by mere circumstantial evidence from which such hostility or malice may or may not be inferred."


"The appellant urges that there was reversible error in the exclusion of testimony showing the hostility of the witness O'Brien towards the defendant. One Tausig was called by the defendant and, after testifying to some facts relative to the shooting, stated that he had known William O'Brien for six or seven years, and that he remembered seeing him two nights after the shooting occurred at No. 23 Bowery. Whereupon this question was asked, 'Did O'Brien at that time state whether he would tell the truth or tell a lie as to what happened that morning in reference to Mallon?' Which question he was not permitted to answer. The appellant now urges that this question was put to the witness for the purpose of proving hostility on the part of the witness O'Brien toward the defendant, and that it was error
to exclude it. O'Brien had not been interrogated while on the stand in regard to any such occurrence or conversation. The evidence was offered, of course, for the purpose of impeaching O'Brien.

"There are two rules firmly established by the decisions in this case . . . .

... .

"The second rule is that the hostility of a witness towards a party, against whom he is called, may be proved by cross-examination of the witness, or witnesses may be called who can swear to facts showing it. It would have been competent, therefore, without previous cross-examination upon the subject, to have proved facts tending to establish hostile relations between the witness O'Brien and the defendant. The question is whether, under this rule, mere utterances of the witness claimed to show hostility can be proved, without preliminary interrogation as to those utterances of the witness himself. The reason for the rule requiring, in the case of mere contradictory statements, that there should be a preliminary interrogation, is primarily based upon the uncertainty of hearsay evidence; that when one person undertakes to say, after more or less lapse of time, what another person said, the accuracy of the repetition depends upon the correct understanding in the first instance of the statement, its accurate preservation in the memory of the testifying witness, its accurate reproduction upon the trial, together with the circumstances under which it was first uttered and its relation to the rest of the transaction of which it purports to be a part. With these numerous chances for misunderstanding, forgetfulness, and misrepresentation, it has always been thought, in this state at least, that it was due, not only to the convenience of trials and the interest of justice, but also to the rights of the witness, that he should have an opportunity of tendering his version of the matter in the first instance. Therefore preliminary interrogation of a witness as to contradictory utterances has always been required.

"There does not seem to me to be any reason why the same rule should not apply to mere utterances claimed to indicate hostility. A careful examination of the cases in this state has failed to discover the establishment of a contrary rule."
Reference is here made to *People v Brooks* (supra) and *Brink v Stratton* (supra) and it is pointed out that in neither case was the "question of utterances" involved. The court concludes that the evidence offered in the principle case was properly excluded.

*People v Lustig*, (1912) 206 N.Y. 162, 171.

"Another of the errors, which I regard as grave, was committed in refusing to allow the witness Thomas, called for the defense, to testify concerning a conversation, which he had with Mr. and Mrs. Livingston about the defendant. Thomas testified to having the conversation some time in December, 1909, in the Livingsons' drug store, and was asked to 'tell the jury what was said in respect to this defendant.' This question was objected to by the district attorney as immaterial, irrelevant and incompetent. Whereupon, the defendant's counsel stated: 'I desire to show the hostility of Mr. and Mrs. Livingston.' The court, then, asked 'Did you question Mrs. Livingston touching this hostility?' Defendant's counsel replied, 'I did not question her, but it seems to me that I did not have to.' The witness was not allowed to answer and the defendant excepted. Any objection to the form of the question was obviated by reason of the ground of the exclusion of the evidence. The rule is settled in this state, by repeated decisions of this court, that the hostility of a witness towards a party, against whom he is called, may be proved by any competent evidence. As it was stated in *People v Brooks*, (131 N.Y. 321,325), the hostility 'may be shown by cross-examination of the witness, or witnesses may be called who can swear to facts showing it. There can be no reason for holding that the witness must first be examined as to his hostility, and that then, and not till then witnesses may be called to contradict him.'"

NOTE: Reliance upon *People v Brooks*, seems misplaced. In the Brooks case the evidence of bias consisted of conduct, not utterances. The *Stratton* case is also cited. But it likewise and for the same reason is not in point. However, the *Lustig* case was decided by the Court of Appeals, and would, therefore, seem to represent the New York law. No reference is made to *People v Mallon*. But the *Mallon* case was decided in the Appellate Division of the Supreme Court and therefore does not stand against the *Lustig* decision.

*Sullivan v State*, (1932) 25 Ala. 140, 142 So. 110.
FACTS: The defendant is charged with assault with a deadly weapon. It appears that he shot one Moore with a double barrelled shot gun. As a part of his defense S offered to prove that Moore, the prosecuting witness had on the morning of the attack, alleged in the complaint, set fire to defendant's hay stack. This evidence was offered on two theories. (1) That Moore had committed a felony and defendant was entitled under the statute to use force in arresting Moore, (2) That the evidence tended to show bias and prejudice on the part of Moore.

HELD: That the evidence was inadmissible on both grounds. As to the second ground the court states:

"That defendant insists that this evidence was relevant as tending to show the animus and bias of Henry Moore as a witness. This insistence is untenable. The proper way to show bias of a witness is to ask him directly the state of his feelings, and, if he denies bias, to resort to facts and circumstances tending to show it. In this case the proper predicate was not laid for the introduction of independent circumstances."

Southern Ry. Co. v Harrison, (1914) 191 Ala. 436, 67 So. 597. Suit for injuries sustained by an employee of the defendant Company while riding on an engine of one of the defendant's trains. One Ernest was called as a witness for the plaintiff. The defendant on cross-examination asked him if he had been discharged from the employ of the defendant company at or near the time of the accident. The plaintiff objected to the question and the objection was sustained. The defendant appeals from this ruling.

HELD: The evidence was properly excluded. The court said:

"The trial court committed no reversible error in declining to let the defendant ask the witness Ernest, on cross-examination, to state whether or not he was laid off by the Southern Railway Company on the morning of the accident. The witness had just stated he had not worked for the defendant since that time, and it was therefore immaterial to the issues involved whether he quit or was laid off by the company, unless, as is now suggested in brief of counsel, that the fact he was laid off by the defendant was a circumstance showing ill feeling towards the said defendant, and was a circumstance affecting his credibility. If this be true, the purpose or relevancy of the evidence should
have been suggested to the trial court, as there is nothing in the question which would show that it was being asked to show bias on the part of the witness. Moreover, the more proper and orderly way to have shown bias or ill will was to have asked the witness the direct question as to his state of feelings towards the defendant, and he may have admitted that it was bad. On the other hand if he said it was good, then the defendant could resort to the introduction of facts and circumstances showing that the witness was biased against the defendant."

_Creeping Bear v State_, (1905) 113 Tenn. 322, 87 S.W. 653. The defendant was indicted for murder. W, a witness for the prosecution, was called to testify to the facts of the murder. On cross-examination the defendant sought to bring out that W. was a friend of the deceased and that during the pendency of an appeal in a former case he had taken an active part in trying to keep people from signing a petition seeking a pardon for the defendant. The offer of this proof was refused by the trial court. The defendant then offered a witness to testify to the friendship and the conduct of the witness for the prosecution as independent evidence. This second offer of proof was again rejected. Defendant appeals from a judgment of conviction holding that the action of the trial court was error.

HELD: That the trial court committed error. The court said:

"The testimony should have been admitted. It is always competent to prove the friendliness or unfriendliness of a witness, his partiality for one party or hostility to the other, in order that the jury may judge of his credibility and the trustworthiness of his testimony. It is the experience of trial courts that witnesses are often as much influenced in testifying by feelings of friendship or hostility to parties to the case as by direct pecuniary interest in the result of the trial, and for this reason proof of the relation of the witness to the parties may be shown by proving his conduct and expressions in relation to them by cross-examination of the witness or independently by witnesses called for that purpose. In the latter case the best practice is to direct the adverse witness' attention, where the conversations and statements are proposed to be proved, to the time and place had or are and to whom spoken but this is in the discretion of the court and not absolutely necessary, since the evidence is not for the sole purpose of
contradiction. The answer of the witness on cross-examination is not conclusive, because evidence of his feelings towards the parties is relevant and material."

_Sasser v State_, (1907) 129 Ga. 541, 59 S.E. 255.

The defendant was indicted for murder. A witness who testified for the state was asked by defendant's counsel on cross-examination if he had not had a fight with the defendant and 'hit at him' in a difficulty which had occurred between them. The question was objected to and the trial court refused to allow the witness to answer.

**HELD:** That the trial court acted properly. The court said:

"The purpose of this testimony was to show the state of feeling on the part of the witness toward the defendant. Cr. Code 1895 provides: 'The state of the witness's feelings to the parties, and his relationship, may always be proved for the consideration of the jury. A party cannot prove a difficulty between a witness and a party to the case on trial to show bad feeling on the part of the witness toward him, unless the witness denies that such a feeling exists. Whenever the witness denies that such feeling exists, it is proper to permit the witness to be interrogated as to any difficulty or trouble between them, for the purpose of rebutting this denial and showing that such feeling does exist. It does not appear from this assignment of error that the witness had denied having bad feeling toward the defendant... If a witness admits ill feeling toward a party to a case, he cannot be interrogated as to difficulties between them in order to show bad feeling; but, if a witness denies having ill feeling toward a party to a case, he can be interrogated as to difficulties between him and said party, in order to show bad feeling. A witness can be shown to be friendly with and entertain good feeling toward a party to a case, and, should he deny that this is true evidence is admissible to rebut such denial and show that such friendly state exists."

_Barracough v Union Pac. R. Co._ (1932) 331 Mo. 157. 52 S.W. (2d) 998. Action for wrongful death. Burke, the conductor of the defendant company at the time of the accident testified in behalf of the plaintiff. As a part of the defendant's case the superintendent in charge of the section of the road where the
accident occurred was called and was asked the follow-
ing questions. After it was shown that Burke had been
discharged from the employ of the defendant company at
the time of the accident. "Q. After Mr. Burke was
discharged, did you have any controversy with him about
back pay? Q. I am asking if you personally, as super-
intendent, had any controversy with him about back pay?
Q. What was the controversy between you and Mr. Burke
about, after you discharged him?" The witness was re-
quired to answer that there was a controversy but he
was not required to answer the other questions. On ap-
peal it was contended that the questions were proper.

It was contended for defendant that the question
tended to show bias on the part of the witness Burke
and that they should therefore have been allowed.

It was contended for plaintiff that even though
the questions showed bias on the part of Burke they were
improper because Burke had been asked no questions as to
his bias or as to these matters and therefore no proper
foundation for the questions had been laid.

HELD: That the foundation was not necessary and that
the witness should have been allowed to answer the
questions. The court said:

"Plaintiff says that Burke was never asked about any such
controversy, and therefore it was an improper attempt at
impeachment without laying any foundation therefor. It
is true that a witness cannot be impeached, by showing
statements he has made, unless a foundation is laid by
asking him if he made such statements. Here, however,
no statements of Burke were shown, but only the fact that
a controversy about back pay had existed between him and
the company, and defendant was not permitted to show any
details of the controversy. It will further be noted
that the court said that it was sufficient 'to show he
had a controversy' and that plaintiff's counsel agreed.

"There is considerable conflict of authority as to the
necessity of laying a foundation to impeach a witness for
bias or hostility. 'In some jurisdictions, where ordinar-
ily a foundation must be laid to contradict a witness,
his statements or acts which show hostility or bias are
considered of a different character, and no foundation is
required to be laid. In still other states a distinction
is drawn between acts and statements showing hostility or
bias, a foundation being required in the latter instance,
but not in the former.' It seems reasonable, however, as stated by Wigmore on Evidence, Vol. 2, p. 343, that the rule requiring preliminary inquiry of the witness before offering evidence to show his bias 'applies only to utterances, not to conduct or circumstances, such as an assault or an employment.' Other illustrations of facts or issue of bias without a preliminary inquiry of the witness are: Relationship to a party by blood or marriage, pendancy of litigation between the witness and the party against whom he testifies, and a quarrel or trouble between them."

The court, however, is of the opinion that the questions as to what the details of the quarrel, etc. are is not admissible and that the trial court, therefore, acted properly in refusing to allow answers to the specific questions as to the details of the quarrel here in question.

_Brody v Cooper_, (1924) 45 R.I. 453, 124 Atl. 2. The suit was for damages sustained to plaintiff's car in a collision. The deposition of the insurance adjuster was offered in evidence. The defendant sought to show that the witness who gave the deposition was the insurance adjuster for the company in which plaintiff was insured and to prove by that fact that he was biased in favor of the plaintiff.

**HELD:** That in the absence of a proper foundation this testimony was not admissible. The court said:

"Granting that defendant can impeach the credibility of the deponent, the rules of evidence must still be observed. The evidence to which objection was taken at most might be held to show that the witness had a cause for bias; it does not prove bias in fact and cannot be proved as an independent fact. Even if it was admissible, the witness who is to be impeached must first in cross-examination be interrogated in regard to it and given an opportunity to deny bias or explain the extent thereof or the reason therefor. The fact that in the circumstances the defendant could not cross-examine the witness does not change the rule."

**NOTE:** The case is weakened as to the above point by reason of the fact that the court holds the defendant unable to impeach the witness at all because the deposition was taken at the defendant's request in the first instance and the witness was therefore the witness of the defendant.
Ellsworth v Potter, (1869) 41 Vt. 685.
"It is true that a witness who is examined in open court may not be impeached by proving his declarations out of court, unless he is first particularly inquired of upon the subject. There is some reason for applying the same rule to mere proof of ill feeling which has only been evinced by unkind or threatening remarks about the party; but when there has been an open quarrel or a suit at law between the party and the adverse witness, it becomes a substantive fact and may be proved like relationship, or interest in the event of the suit, without previous inquiry of the witness in regard to it. . . . The proof of such a difficulty, law-suit, interest, or relationship is not, in the ordinary sense, impeaching testimony, although it may be considered in determining the credit to be given the witness."

Fagen v Lentz, (1909) 156 Cal. 681, 105 Pac. 951.
The facts and the holding of the court are succinctly stated in the following excerpts from the opinion:
"Mrs. Minnie Tucker was a witness for the plaintiff, but was not questioned and did not give any testimony as to her feelings toward either of the defendants, or as to the making of any statement tending to show hostility or bias. On the direct examination of defendant, Charles W. Lentz, he was asked whether Mrs. Tucker did not, after some difficulty between her husband and himself, shake her hand and fist at him and say? 'I will give you all the court you want, before I get through with you.' An objection to this question was sustained. It is settled in this state that the same foundation as must be laid for introducing prior contradictory statements of a witness is equally necessary to the introduction of evidence of declarations showing hostility or ill feeling on the part of the witness, in other words, that before such evidence is introduced, the witness so sought to be attacked must be asked as to the making of such statements. . . . The ruling of the trial court sustaining the objection to the question asked Mr. Lentz relative to Mrs. Tucker was in accord with this rule."
3. MISCELLANEOUS CALIFORNIA CASES INVOLVING BIAS OR INTEREST

McLaughlin v Los Angeles Ry. Corp. (1919) 180 Cal. 527, 538.
People v Thompson, (1891) 92 Cal. 506, 509; 28 Pac. 589.
People v Pickens, (1923) 61 Cal. App. 405, 407; 214 Pac. 1027.
National etc. Mfg. Co. v Producers R. Co., (1915) 169 Cal. 740, 742; 147; Pac. 963.
People v McLean, (1902) 135 Cal. 306, 308, 67 Pac. 770.
People v Nikell, (1904) 144 Cal. 200; 77 Pac. 916.
Salle v Moyer, (1891) 91 Cal. 165, 168; 27 Pac. 513.
People v Wong Chuey, (1897) 117 Cal. 624, 627; 149 Pac. 833.
People v Keyes, (1930) 103 Cal. App. 624, 643; 284 Pac. 1096.
People v Tomalty, (1910) 14 Cal. App. 224, 111 Pac. 513.
Estate of Martin, (1915) 170 Cal. 657, 671; 151 Pac. 138.
People v Goldenson, (1888) 76 Cal. 328, 324; 19 Pac. 161.
People v Peter, (1932) 125 Cal. App. 657, 663; 14 Pac. (2d) 166.
People v Pantages, (1931) 212 Cal. 237, 252, 259.
People v Swoape, (1925) 75 Cal. App. 404, 409; 242 Pac. 1067.
People v Bennett, (1926) 79 Cal. App. 76, 94; 2249 Pac. 20.
People v Hoffman, (1925) 195 Cal. 295, 232; Pac. 974.
People v Blockwell, (1927) 81 Cal. App. 417, 419; 253 Pac. 964.
People v Johnson, (1895) 106 Cal. 289, 292; 39 Pac. 622.